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BEFORE NEXT TIME: THE CONTINUED EVOLUTION OF STATUTORY RESPONSES TO MASS FATALITY INCIDENTS

Trudy Henson

Before the terrorist attacks of September 11, 2001 (9/11), U.S. states relied upon presumptive death statutes to issue death certificates when remains could not be found.¹ These statutes permitted the issuance of presumptive death certificates to a proper petitioner after a statutorily-defined period of time, typically five to seven years. Many U.S. states also allowed petitioners to request death certificates if the petitioner could prove the presumed dead had been exposed to a “specific peril”—such as being at sea during a major storm.² Even before 9/11, however, mass fatality events overwhelmed local resources. Events such as airplane crashes led many to question the efficacy of the identification and issuance process, particularly where searches for survivors had ceased, and, in the case of airplane crashes, flight manifests clearly identified passengers on board—arguably making it less uncertain whether a presumptive death certificate was appropriate.

Even before September 11, mass fatalities occurred often enough to raise concerns about the ability of localities to promptly handle multiple deaths. The September 11 attacks brought this issue into national focus as New York City worked to respond to the largest foreign attack on U.S. soil, and other affected states looked for ways to ease the burden on families and survivors impacted by the attacks. In the immediate aftermath of September 11, four overwhelmed U.S. states realized their current presumptive death statutes did not contemplate a mass fatality event or were not equipped to handle multiple deaths with unrecovered remains. The result was a number of extraordinary and temporary measures to streamline the process for issuing presumptive death certificates to next of kin. Several years later, Hurricane Katrina hit Louisiana, and legislators found themselves implementing a similar solution to a familiar problem. In reaction to incidents in the decade that followed September 11, including the 2004 Indian Ocean Tsunami, Hurricanes Katrina and Rita in 2005, and the 2011 earthquake, tsunami, and nuclear disaster in Japan, other U.S. states, as well as other countries and international organizations, re-evaluated and

1. See, e.g., DEL. CODE ANN. tit. 12, § 1701 (2007).

2. See *id.*

expanded their respective presumptive death processes to better address deaths arising from mass fatality incidents.

This evolution in statutory response is intended to ease the administrative burden on both surviving family members and overwhelmed government agencies by reducing administrative burdens and helping to speed the delivery of benefits for survivors of missing persons. Although federal oversight encourages mass fatality planning, and states are generally well-equipped to handle mass fatalities, issuing death certificates in a mass fatality scenario poses unique problems often unanticipated by mass fatality management plans and specific peril statutes. Statutes adopted after 9/11 are no exception. This Note seeks to examine and evaluate whether the changes in statutory responses effectively address the matters of missing persons and presumptions of death. First, it will address the difficulties of handling a mass fatality generally and then examine the legal practice surrounding death. It will then examine presumptive death certificates and specific peril statutes, particularly when used for mass fatalities, and compare several states' post-9/11 enactments to discuss the relative merits of each. Following this examination and evaluation, this Note highlights areas of concern and makes recommendations for further changes in statutory responses to mass fatalities.

I. MASS DISASTERS AND FATALITIES GENERALLY

While response to a mass disaster has always been important, management of mass fatalities specifically commands increasing attention from the treatment of victim remains to the treatment of surviving family members. The shift in focus is the result of hard-learned lessons from mass fatality incidents and an acknowledgment that "the way [bereaved] were dealt with in the days and weeks following disaster [can have] as devastating an effect as the facts of the deaths themselves."³ In 1999, the Chief Medical Examiner for the State of Oklahoma wrote that the well-intentioned attempt of funeral directors to keep loved ones from viewing victims of the Murrah Building Bombing may have, for some people, "caused a significant delay in

3. Anne Eyre & Radford Semele, *Improving Procedures and Minimising Distress: Issues in the Identification of Victims Following Disasters*, 17 AUSTL. J. EMERGENCY MGMT. 9, 9 (2002).

the grief processing,”⁴ because family members felt uncertain that the person they buried was truly their relative.⁵

A disaster resulting in a mass fatality can have profound emotional and psychological effects, but it also can have tremendous legal consequences. Taken singularly, death brings about a host of legal issues, including a survivor’s right to benefits or pensions, bank accounts, insurance settlements, properties, business partnerships, creditor relationships, and contractual obligations.⁶ Death and its legal consequences become more complicated during a mass fatality event: body recovery is usually the last phase of response,⁷ meaning that a victim’s survivors can go weeks, months, and occasionally years⁸ before remains are found, identified, and issued a

4. Fred Jordan, *The Role of the Medical Examiner in Mass Casualty Situations with Special References to the Alfred P. Murrah Building Bombing*, 92 J. OKLA. STATE MED. ASS’N 159, 163 (1999).

5. *Id.*

6. A disaster can also affect availability of funeral funds, which may be critical for survivors facing catastrophic losses and unknown financial conditions. *See, e.g., Disaster Funeral Assistance Fact Sheet*, FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/individual-assistance-program-tools/disaster-funeral-assistance-fact-sheet> (last updated July 14, 2012) (requiring death certificate to establish eligibility for funeral assistance).

7. Many times, a mass disaster can cause both mass casualties and mass fatalities. A “mass casualty incident” includes injuries, and can result in a surge of injured individuals that overwhelm emergency responders and healthcare infrastructure. A “mass fatality” refers specifically to a large number of deaths.

8. Martha T. Moore, *Remains Bring Hope, Frustration for 9/11 Families*, USA TODAY, Apr. 20, 2006, http://www.usatoday.com/news/nation/2006-04-19-remains_x.htm (noting that in 2006, excavators at the World Trade Center site uncovered more remains from 9/11); *see also* John Bussey, *Often the Dead are Never Found*, WALL ST. J., Apr. 5, 2011, <http://online.wsj.com/article/SB10001424052748704587004576243083745511592.html> (stating that in 2011, officials still were not able to identify more than 1,000 of the 2,752 people killed when the World Trade Center towers fell). One notable exception to this tendency was Joplin, Missouri, which experienced a devastating tornado in 2011. In spite of the tornado destroying hospitals and other critical infrastructure, the 161 fatalities were handled speedily; by June 4, 2011, fatality management operations ceased. The statuses of 268 individuals on a missing persons list were confirmed in less than 2 weeks, although processing of remains and death certificates took longer. *See* FED. EMERGENCY MGMT. AGENCY, THE RESPONSE TO THE 2011 JOPLIN, MISSOURI, TORNADO LESSONS LEARNED STUDY 3, 17 (2011), kyem.ky.gov/teams/Documents/Joplin%20Tornado%20Response,%20Lessons%20Learned%20Report,%20FEMA,%20December%2020,%202011.pdf.

death certificate. Depending on the type of incident, recovery and identification of remains may simply be impossible. During this time, survivors may be unable to begin administrative processes such as filing insurance or benefits claims,⁹ because death certificates are often necessary for “applying to various public agencies and private groups distributing funds to the families . . . collecting life insurance proceeds,” and the probate process for wills.¹⁰ For survivors who depended solely on the deceased, such a delay may impede delivery of important benefits necessary for survivors’ standard of living and even food security. Such instability further adds to the trauma of losing a loved one.

Even before September 11, mass fatalities occurred often enough to raise concerns about the ability of localities to promptly handle multiple deaths where remains were unrecovered or unidentifiable. In 2000, following the Alaska Airlines crash that killed 88 people, families of victims expressed dismay at the delay in death certificates, stating that the crash “highlight[ed] the need for federal legislation.”¹¹ As one family of the deceased stated,

9. This does not necessarily include insurance benefits, which will generally be subject to contract law based on the terms of the original agreement between the company and the insured. Most insurance companies require a death certificate before filing a claim; however, private companies have discretion in this area. In the immediate aftermath of 9/11, many companies implemented their own extraordinary measures. For example, Phoenix Insurance Company established special procedures to expedite the claims of those affected, most notably waiving the requirement of a death certificate to begin claim processing. Instead, the company accepted other forms of proof of death. *Phoenix Establishes Special Procedures to Respond to Needs of Customers Affected by September 11 Terrorist Attacks*, PHOENIX, Sept. 17, 2001, <http://phx.corporate-ir.net/phoenix.zhtml?c=97632&p=irol-newsArticle&ID=206956&highlight=>. On October 1, 2001, recognizing “the tremendous loss of life” and “the difficult circumstances surrounding the recovery of the victims” of 9/11, Delaware’s Department of Insurance issued a bulletin requiring all insurers to accept “a fully executed affidavit in the [specified] form . . . in lieu of a death certificate if such certificate is not available” with respect to death claims arising out disaster at the World Trade Center, the Pentagon, and the Pennsylvania Flight 93 crash site. *Affidavit in Lieu of a Death Certificate for Victims of the September 11 Disasters Involving the World Trade Center, the Pentagon and Somerset County, Pa.*, BULL. 8 (Dep’t of Ins., Del.), Oct. 1, 2001, available at <http://www.delawareinsurance.gov/departments/documents/bulletins/Bull8.pdf>. Insurers could use other information as well to process the claim, if they elected. *Id.*

10. *Hirsh v. Frieden*, 758 N.Y.S.2d 787, 788 (N.Y. Sup. Ct. 2003).

11. Soraya Sarhaddi Nelson, *Death Certificate Delays Add to Grief in Air Crashes*, L.A. TIMES, Feb. 16, 2000, <http://articles.latimes.com/2000/feb/16/news/mn-64804>. At the time, a report correctly stated that federal legislation mandating states to deliver death

“[w]hen the world knows 217 people are dead and that there are no survivors, why should their families have to wait” for their death pronouncement?¹² In 2000, one attorney estimated that half of his airline cases addressed complaints involving death certificates or recovery of remains.¹³

The unsatisfying answer is that mass fatalities complicate the issuance of death certificates. They give rise to a myriad of legal concerns even without the added uncertainty of unrecovered or unidentified remains.¹⁴ Mass fatalities are usually part of a larger mass disaster, and the response depends entirely on the type of incident. The incident triggering the mass fatality deeply affects a number of issues, particularly body recovery and disaster victim identification (DVI), key elements for issuance of a standard death certificate.¹⁵

For example, an airplane crash typically has a very site-specific area, and includes a flight manifest, making it easy to determine who was on board the plane when it crashed.¹⁶ Responders can quickly evaluate if the response

certificates within a certain time frame would intrude on the state’s police and health powers. *Id.*

12. *Id.*

13. *Id.*

14. The other concerns are outside the scope of this article, but include the “quasi-property” right to the body and the right to bury the dead. *See* Boorman v. Nev. Mem’l Cremation Soc’y, 236 P.3d 4, 6-10 (Nev. 2010) (citing *Shults v. U.S.*, 995 F. Supp. 1270, 1275-76 (D. Kan. 1998) (construing that Mississippi law did not support a claim for conversion and noting that “the partial remains of a human body[] has no compensable value”)); *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 882 (Colo. 1994) (“We formally reject the fictional theory that a property right exists in a dead body that would support an action for conversion.”); *Walser v. Resthaven*, 633 A.2d 466, 477 (Md. Ct. Spec. App. 1993); *see also* *World Trade Ctr. Families for Proper Burial, Inc. v. City of New York*, 567 F. Supp. 2d 529, 536 (S.D.N.Y. 2008), *aff’d*, 359 Fed. Appx. 177 (2d Cir. 2009).

15. *See* *Eyre & Semele*, *supra* note 3.

16. Thomas J. Brondolo, *Factors in Assessing Mass Fatality Incidents*, IAEM BULL. (Int’l Ass’n of Emergency Managers, N.Y.), Oct. 2006, at 12, http://www.brondoloassociates.com/article_IAEM_AssessingMFI.pdf (identifying five factors that define a mass fatality: 1) the number of fatalities; 2) the rate of recovery; 3) whether there is a manifest; 4) the condition of remains; and 5) jurisdiction of the incident).

should be rescue, recovery, or both. Conversely, the attacks on the World Trade Center were limited to a relatively dense geographic area, but the number and identities of people affected were largely unknown. Employers who worked in the World Trade Center were able to provide employee lists, but given the commercial nature of the World Trade Center and the surrounding areas, there was no definite way to account for people's whereabouts.¹⁷

By contrast, it may take weeks to identify the extent of fatalities and ensure recovery of the deceased in a more dispersed mass fatality event. For example, after Hurricane Katrina, recovery and collection of remains in New Orleans did not begin until nearly 10 days after the water breached the levees and flooded the city.¹⁸ Likewise, in Japan, when the 2011 earthquake and tsunami struck, the nuclear radiation kept rescuers from starting recovery efforts in the 12-mile area around the Fukushima power plant until a month after the disaster.¹⁹ Pandemics, such as the 1918 Spanish Flu are often both geographically-dispersed and of long duration, creating difficult fatality response and making recovery more difficult.²⁰

Pandemic flus, which often have high fatality rates, also highlight a final complicating factor: the scale of events greatly impacts the recovery, or even the ability to begin recovery. Mass disasters, such as the 2004 Indian Ocean Tsunami, the 2010 Haiti earthquake, and the 2011 Japan earthquake and tsunami were of such a scale that they destroyed or overwhelmed all local

17. Estimates for occupancy on September 11th were 17,400 tenants and visitors; initial reports of missing persons went up to 20,000 people. James R. Gill, *9/11 and the New York City Office of Chief Medical Examiner*, 2 *FORENSIC SCI., MED., & PATHOLOGY* 29, 29-30 (2006). While this number was significantly narrowed, it demonstrates the difficulty accounting for people in a highly trafficked, commercial area. *See also In re LaFuente*, 743 N.Y.S.2d 678, 683 (2002); *In re Philip*, 851 N.Y.S.2d 141, 142-43 (2008).

18. *New Orleans Begins Collecting Katrina's Victims*, ASSOCIATED PRESS, Sept. 9, 2005, http://www.msnbc.msn.com/id/9259667/ns/us_news-katrina_the_long_road_back/t/new-orleans-begins-collecting-katrinass-victims/.

19. Hiroko Tabuchi, *An Anniversary of 'Heartbreaking Grief' in Japan*, N.Y. TIMES, Mar. 11, 2012, http://www.nytimes.com/2012/03/12/world/asia/a-year-later-effects-of-japans-disaster-are-still-unfolding.html?pagewanted=all&_r=0.

20. JOHN M. BARRY, *THE GREAT INFLUENZA: THE EPIC STORY OF THE DEADLIEST PLAGUE IN HISTORY* 223, 326 (Penguin Books 2005).

resources, effectively halting any functions, including recovery, for a sustained period.²¹

Manmade or natural disasters that impact infrastructure and that require first responders to focus on saving lives make body identification and body recovery very difficult. Even when remains are found after a disaster, the remains may be too small or compromised to provide DNA, or the deceased may not have family members or others able to aid in the victim identification process.²² In some cases, it may not be possible to identify or even find all remains. Building collapses, landslides, tsunamis, or similar mass disasters often cause victims' bodies to be buried by debris. Oftentimes, there is an urgency to dispose of dead bodies, usually out of a fear that bodies pose a health risk. Although this concern is frequently overstated, it remains pervasive.²³ In mass fatalities that overwhelm and incapacitate regions, survivors may handle bodies in the best way they know how—often stacking bodies in a designated area or burying them in mass graves.²⁴ Such conditions may speed deterioration or distort remains.²⁵

²¹ See, e.g., Simon Romero & Neil MacFarquhar, *Haiti's Many Troubles Keep Bodies Uncounted*, N.Y. TIMES, Jan. 21, 2010, <http://www.nytimes.com/2010/01/21/world/americas/21death toll.html>.

²² See, e.g., *World Trade Ctr. Families for Proper Burial, Inc. v. City of New York*, 567 F. Supp. 2d 529, 536 (S.D.N.Y. 2008), *aff'd*, 359 Fed. Appx. 177 (2d Cir. 2009) (ruling on when remains are too small to provide DNA). However, in examining the problem of the deceased lacking someone to aid in the victim identification process, New Orleans is an instructive example.

²³ J. Fisher, *Water Sanitation Health: Disposal of Dead Bodies in Emergency Conditions*, WORLD HEALTH ORG., http://www.who.int/water_sanitation_health/hygiene/emergencies/deadbodies.pdf (last visited July 20, 2012) ("bodies are unlikely to cause outbreaks of diseases . . . though they may transmit gastroenteritis or food poisoning syndrome to survivors if they contaminate streams, wells, or other water sources."); see Pan American Health Organization, *Unseating the Myths Surrounding the Management of Cadavers*, DISASTER NEWSL., No. 93 (2003).

²⁴ In the 2004 Indian Ocean tsunami, several mass graves were dug without attempting any sort of identification. In the 2010 Haiti Earthquake, locals began collecting and burying the dead themselves. While such actions are understandable, they create a myriad of problems, as in addition to making identification difficult or impossible, in the case of Haiti, it made an accurate account of the dead impossible. The total count still varies widely, from conservative estimates of approximately 85,000 dead, to the Haitian government's estimate of 300,000 dead. See Eyder Peralta, *Report: Death Toll of Haiti Much Lower Than Government Said*, NPR.ORG (May 31, 2011), <http://www.npr.org/blogs/thetwo-way/2011/05/31/136832070/report-death-toll-in-haiti->

The conditions of the remains will have a time-multiplying effect: fragmented remains, such as those often associated with bombs, must each be treated as a separate individual.²⁶ For example, in 1998, rescuers for the crash of Swissair Flight 111 off the coast of Nova Scotia recovered only one intact body; the rest of the 229 victims were recovered in approximately 15,000 pieces.²⁷ Thus, even when responders make every effort to recover remains, certain types of mass disasters make this practically impossible.

II. LEGAL FRAMEWORK FOR MASS FATALITY EVENTS

Generally, states and localities are responsible for the public health concerns raised by mass fatality events, including handling and identifying the remains.²⁸ The police power provides the states with broad authority to pass and enforce laws to protect the public health and safety, including laws that pertain to death or mass fatalities, such as those regarding transportation and disposal of human remains, administration of vital records, and

earthquake-much-lower-than-government-estimates. In one particularly haunting account, a community leader and surviving neighbors attempted to compile their own list of the dead, estimating the earthquake killed a third of their community of 3,000. See Simon Romero & Neil MacFarquhar, *Haiti's Many Troubles Keep Bodies Uncounted*, N.Y. TIMES, Jan. 21, 2010, <http://www.nytimes.com/2010/01/21/world/americas/21death toll.html>.

25. In the aftermath of Hurricane Katrina, many bodies were recovered in groups that had been left vulnerable to the elements. Heat, water, and other factors may all cause rapid deterioration, particularly when the disaster is of a nature that delays aid and recovery workers, such as in the 2010 Haiti earthquake. Pandemics may produce similar scenarios as well. See BARRY, *supra* note 20, at 326.

26. See Brondolo, *supra* note 16.

27. Dorothy Grant, *Swissair Disaster Taught Medical Examiners a Lesson in Logistical Challenges*, 161 CANADIAN MED. ASS'N J. 743, 743 (1999), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1230633/pdf/cmaj_161_6_743.pdf.

28. Generally, public health laws are reserved to the states via the Tenth Amendment of the United States Constitution, through the States' police power. U.S. CONST. amend. X; *Tighe v. Osborne*, 131 A. 801, 803 (Md. Ct. App. 1925). The police power is generally defined as the "power inherent in the state to prescribe within the limits of the federal and state constitutions reasonable regulations necessary to preserve the public order, health, safety, or morals." *Tighe*, 131 A. at 803. The emphasis on state and local government in emergency response also stems from general emergency management principles that all disaster response begins locally and expands to state and federal levels.

establishment of cemeteries and burial sites.²⁹ States, in turn, have traditionally delegated these roles to local medical examiners or coroners (ME/C).³⁰

In general, investigation and processing of a death, as well as custody of a body, is under the jurisdiction of the ME/C where the death occurred.³¹ Local ME/Cs usually have complete jurisdiction of a dead body. Control of the body “extends from the scene of death, to transport from the scene of death, investigation of death, and [. . .] the right to release the body” when the investigation is complete.³² If the body is unclaimed or unidentifiable, the ME/C is responsible for storage and ultimate disposition of the remains.³³ Even though the World Trade Center attacks killed individuals

29. See *United Haulers Ass’n, Inc. v. Onieda-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1795 (2007) (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (noting that “[t]he States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”)) (internal citations omitted); see also *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358, 366 (1910).

30. See, e.g., MD. CODE ANN., HEALTH-GEN. § 5-506 (2012) (outlining parameters for “control of a body by a health officer”).

31. See, e.g., CAL. HEALTH & SAFETY CODE § 7102 (1965).

32. Michael Greenberger, Trudy Henson, Sean Kates, & Amy Major, *Legal Issues in Mass Fatality Events*, in *DEATH IN LARGE NUMBERS: THE SCIENCE, POLICY, AND MANAGEMENT OF MASS FATALITY EVENTS* 239, 244 (Elin A. Gursky & Marcella Farinelli Fierro eds., American Medical Association 2012). See, e.g., CAL. HEALTH & SAFETY CODE § 7102 (1965) (stating that “in any case where a coroner is required by law to investigate the cause of death, the coroner is entitled to the custody of the remains of the person whose death is the subject of investigation until the conclusion of the autopsy or medical investigation by the coroner.”); see also MD. CODE ANN., HEALTH-GEN. § 5-309 (2008) (describing the duties of a medical examiner to include that “immediately on notification that a medical examiner’s case has occurred, the medical examiner or an investigator of the medical examiner shall go to and take charge of the body.”); MD. CODE REGS. 10.35.01.20 (“the deputy medical examiner or forensic investigator shall arrange for body transportation services of human remains from a scene of death in Maryland to a specified location within Maryland.”).

33. See, e.g., CAL. HEALTH & SAFETY CODE § 7104(a) (stating: “[w]hen no provision is made by the decedent, or where the estate is insufficient to provide for interment and the duty of interment does not devolve upon any other person residing in the state or if such person cannot (sic) after reasonable diligence be found within the state the person who has custody of the remains may require the coroner of the county where the decedent

from nearly 30 different countries, the New York City Medical Examiner retained jurisdiction over the bodies, and was responsible for identification and issuance of death certificates for the 2,749 people killed.³⁴ All identification and processing of the remains was coordinated and executed through that office.³⁵

While these public health activities typically reside with the state, the federal government has provided guidance and aid. On occasion, the federal government has issued mandates regarding state and local emergency preparedness, including mass fatality management and mass fatality management plans.³⁶ These plans, while necessary, primarily focus on the healthcare side of handling and storing bodies and almost universally leave intact the roles and responsibilities traditionally assigned to coroners or medical examiners. For example, California's Health and Safety Code charges the local county coroner with all of the duties described in the paragraph above.³⁷ Its Mass Fatality Management Guide extends those responsibilities, recognizing the independence of the county coroner in its planning assumptions,³⁸ even in incidents likely to involve regional or federal partners. While California state coroners may assist county coroners by taking control of the body for identification and disposal purposes, the

resided at time of death to take possession of the remains and the coroner shall inter the remains in the manner provided for the interment of indigent dead.”).

34. Gill, *supra* note 17, at 29-30.

35. *Id.* at 29-31.

36. See DEP'T OF HOMELAND SEC., NAT'L RESPONSE FRAMEWORK (NRF) i (2008), <http://www.fema.gov/pdf/emergency/nrf/nrf-core.pdf>. The NRF is “a guide to how the Nation conducts all-hazards response” and describes “specific authorities and best practices for managing incidents that range from the serious but purely local, to large-scale terrorist attacks or catastrophic natural disasters.” *Id.* at i. The NRF also created Emergency Support Functions (ESF) Annexes to address specific areas of concern. Of particular relevance here, ESF #8, deals directly with Public Health and Medical Services, and addresses, proper management of mass fatality incidents. See FED. EMERGENCY MGMT. AGENCY, NAT'L RESPONSE FRAMEWORK (NRF) ESF #8-7 (2008), <http://www.fema.gov/pdf/emergency/nrf/nrf-esf-08.pdf>.

37. See, e.g., CAL. HEALTH & SAFETY CODE §§ 7102-7108.

38. CAL. OFFICE OF EMERGENCY SERV., THE CALIFORNIA MASS FATALITY MANAGEMENT GUIDE: A SUPPLEMENT TO THE STATE OF CALIFORNIA CORONERS' MUTUAL AID PLAN 26 (2007).

final line of responsibility is always at the county level.³⁹ Even federally-administered assistance, such as the Disaster Mortuary Operational Response Teams (DMORT), recognizes this primacy. When a number of New Orleans residents questioned inaccuracies on victims' death certificates following Hurricane Katrina, they were told that death certificates were "the responsibility of the Orleans parish coroner."⁴⁰

Taken singularly, unrecovered or unidentified remains may cause problems, but in a mass fatality, these problems are multiplied, and the effect is more than staggering statistics. A localized mass fatality can easily produce more bodies in a day than a ME/C office may handle in a year. Thus, local ME/Cs may become overwhelmed, even in large cities such as New York City that process thousands of bodies every year.⁴¹ The New York City Office of the Chief Medical Examiner annually processes about 5,000 bodies. The September 11 attacks on the World Trade Center killed approximately half that many people in one day. Only 288 intact bodies were recovered; the rest were recovered as nearly 20,000 individual remains.⁴² Other major cities handling similar numbers of deaths per year are frequently operating at capacity, therefore, a mass fatality could easily overwhelm their resources.⁴³ Such statistics imply that survivors who

39. *Id.*

40. Shaila Dewan, *Bungled Records of Storm Deaths Renew Anguish*, N.Y. TIMES, Nov. 13, 2005, at 26. This arguably could have been less about recognizing local ME/Cs primacy and more about avoiding blame.

41. Usually, the entire office performs approximately 5,500 autopsies a year. See Gill, *supra* note 17, at 29.

42. *Id.* at 30. The OCME worked 24 hours a day, 7 days a week, from September to December, 16 hours a day, 7 days a week from December to February, and 8 hours a day, 7 days a week, through May 2002. *Id.*

43. The Office of the Medical Examiner of Cook County processes approximately 5,000 bodies a year, but is at capacity for storage. OFF. MED. EXAM'R. COOK CNTY., http://www.cookcountygov.com/portal/server.pt/community/medical_examiner_office_of/307/medical_examiner_office_of (last visited July 9, 2012). In comparison, the Los Angeles County Department of Coroner accepts approximately 8,700 cases a year. L.A. CNTY. DEP'T. CORONER, *Los Angeles County Department of Coroner Annual Report*, (2009), available at http://coroner.lacounty.gov/Docs/2009%20Annual%20Report_FINAL.pdf. Large city morgues may be capable of holding hundreds of bodies; but small cities have a much smaller capacity. MARION CNTY. CORONER'S OFF., <http://www.indy.gov/eGov/County/Coroner/Pages/deathinvestigation.aspx> (last visited July 9, 2012).

depend on victims may have to wait months or years before receiving a death certificate that will entitle them to essential benefits. In devastated areas, such benefits may be the difference between having food on the table or a roof over their heads.

III. DEATH CERTIFICATES, PRESUMED DEATH, AND SPECIFIC PERILS

Presumed death becomes more important when the nature of a disaster delays recovery, as delayed recovery will inevitably delay Disaster Victim Identification, and issuance of death certificates. Under normal circumstances, the coroner or medical examiner will investigate the death, if necessary, and issue a death certificate that identifies the time, date, and cause of death.⁴⁴ This death certificate is required for survivors to begin a number of legal and administrative processes, including initiating will probate, filing insurance claims, gaining access to or settling accounts, and receiving other benefits.

Because of the legal implications surrounding death, states have long had “presumptive death” provisions for issuing death certificates when a body is not found. Presumptive deaths are “a determination by court of competent jurisdiction that . . . a death . . . has occurred or is presumed to have occurred, but the body . . . has not been located or recovered.”⁴⁵ A presumptive death certificate may be issued to a proper petitioner after a statutorily prescribed period of time elapses. Because of the uncertainty surrounding a death where the location of the body is unknown and the immense complexities that can arise from an erroneous declaration of death, the waiting period for a presumptive death certificate is lengthy and typically ranges from five to seven years from the day the person was reported missing.⁴⁶ Some states, such as New York or Georgia, require less time (three and four years, respectively).⁴⁷ Others, like Maryland, do not establish a statutorily defined period of time, but allow courts to determine if a presumptive death certificate is appropriate based upon evidence presented by the petitioner.⁴⁸

44. See generally Eyre & Semele, *supra* note 3.

45. FL. ST. ANN. §382.012(1)(a) (West 2012).

46. See, e.g., CAL. PROB. CODE § 12401 (West 2012).

47. N.Y. EST. POWERS & TRUSTS LAW § 2-1.7 (McKinney 2012); GA CODE ANN. § 53-9-1 (2011).

48. MD. CODE ANN., CTS. & JUD. PROC. § 3-102 (Lexis 2012). Maryland and North Carolina are the only states that do not define a specific period of time that must elapse prior to the issuance of a presumptive death certificate.

In addition to indicating the number of years a person must be missing and the required level of proof (ranging from clear and convincing evidence to circumstantial evidence), presumptive death statutes also usually specify that “time of death” is considered to be at the end of the waiting period. A person’s time of death is presumed “to have occurred at the end of the period unless there is evidence establishing that death occurred earlier.”⁴⁹ Thus, for example, in a state with a five-year waiting period, a person who was last seen or heard from on January 1, 2012, would be declared dead January 1, 2017. This means that survivors would not be eligible for any benefits for the five years that have passed, including any benefits that might arise from the disappearance itself.⁵⁰

Many states will issue presumptive death certificates earlier than the statutorily-defined period if the deceased was exposed to certain circumstances. Known as “specific peril” statutes or clauses, these provisions establish a judicial remedy for the next of kin by allowing a court to issue a presumptive death certificate if appropriate.⁵¹ A petitioner can present evidence to a judge that the deceased was exposed to a specific peril, verify that the petitioner has made a diligent search and inquiry for the absentee, and document these facts.⁵² The court will review the petition against the statutorily defined standard of evidence⁵³ and issue a presumptive death certificate where appropriate. Delaware’s presumption of death statute with a specific peril clause is typical, stating in relevant part:

(a) When the death of a person or the date thereof is in issue, the unexplained absence from the last known place of residence and

49. FL. STAT. ANN. § 5.171(c) (West 2012).

50. See *Matter of Consentino*, 177 Misc.2d 629, 631 (N.Y. Sur. Ct. 1998) (where a missing firefighter’s wife sought a determination that her husband died as of the date of his disappearance because their family might be eligible for additional benefits). For families of 9/11 victims, a date of death three years after 9/11 would negate eligibility for 9/11-specific disaster funds.

51. See, e.g., DEL. CODE ANN. tit. 12, § 1701 (2007).

52. See, e.g., *Garden v. Garden*, 7 Del. 574, 1863 WL 816 (Del. Super. Ct. 1863).

53. Burden of proof ranges from clear and convincing evidence to evidence making death more probable than survival. Compare *In re Philip*, 851 N.Y.S.2d 141, 143 (N.Y. App. Div. 2008) (applying a “clear and convincing” standard with a New York court), with *Conservatorship of Geiger*, 3 Cal. App. 4th 127 (Ct. App. 4th 1992) (shifting the burden of proof to the opposing party once the prerequisites were proved “more likely than not” in California.).

the fact that the person has been unheard of for 7 years may be a sufficient ground for finding that the person died 7 years after the person was last heard of.

(b) The fact that a person was exposed to a specific peril of death may be sufficient ground for finding that the person died less than 7 years after the person was last heard of.⁵⁴

Typically, like procedures for presumption of death, specific peril statutes or clauses establish requirements for diligent search and inquiry, standards of evidence, and time of death declarations. Unlike the typical presumption of death statute, however, specific peril statutes usually declare death of the absentee at the time of the specific peril or the day the absentee was last seen or heard from, rather than at the end of the period. Such a distinction can have a tremendous impact on survivors' access to benefits.

While presumptive death certificates and specific peril clauses are effective measures against occasional cases of unrecovered remains, they usually place a significant administrative burden on both petitioners and governments that may be impractical in a mass disaster. For example, in New York, the absentee's next of kin must file a petition with the court for a declaration and submit supporting documentation of the search for the absentee.⁵⁵ Courts must adjudicate the matter and often must submit paperwork to other agencies, such as the ME/C office or county registrar. Additionally, public notice of the declaration is often required.⁵⁶ Periodic airplane crashes had already brought the significant administrative burden to the attention of several states;⁵⁷ however, the attacks on September 11 changed all of this.

IV. EXTRAORDINARY MEASURES: TEMPORARY LEGISLATIVE RESPONSES

Prior to 9/11, many states did not have specific peril statutes or clauses in their presumptive death statutes, although some states recognized the remedy in common law.⁵⁸ Although many states now recognize specific

54. DEL. CODE ANN. tit. 12, § 1701.

55. See N.Y. EST. POWERS & TRUSTS LAW § 2-1.7.

56. See *id.*

57. See *supra* discussion in section I.

58. See *infra*, note 62.

peril in common law,⁵⁹ the statutes standardize and codify the practice, alleviating the need for lengthy adjudication for each case.⁶⁰ States that *did* have specific peril statutes were typically coastal with heavy maritime activity or experienced frequent natural disasters, such as California.

Mass fatalities were not originally contemplated as a “specific peril” under these statutes. Some exceptions exist: in 1985, West Virginia enacted a disaster-specific statute relating to presumptive deaths from severe flooding.⁶¹ However, such events were too irregular for most states to codify mass fatalities more generally, and manmade or terrorist events were not contemplated as a “specific peril.” Immediately after 9/11, however, those states most heavily affected—New York, New Jersey, Virginia, and Pennsylvania—recognized an overwhelming need to accelerate required procedures for obtaining a death certificate. Several years later, after Hurricane Katrina, Louisiana found itself reacting to a similar problem with a familiar solution.

A. Pennsylvania, Virginia, and New Jersey

Pennsylvania, Virginia, and New Jersey acted quickly to enact temporary statutes that loosely followed the “specific peril” model, although each state had variations that were later followed by other states.⁶² For example, Pennsylvania, the crash site of United Airlines Flight 93, amended its presumptive death statute one month after 9/11 to include the terrorists attacks, stating that the attacks “constitute specific perils within the meaning

59. See, e.g., *Garden v. Garden*, 7 Del. 574, at 1863 WL 816, at *3 (Del. Super. Ct. 1863); see also New Jersey, discussed *infra* note 60.

60. New Jersey, which amended its statute after 9/11, stated that the amendment “provide[d] essentially for a statutory finding of ‘specific peril,’” and stated that while New Jersey courts had the authority to apply the specific peril doctrine, “now is an appropriate time to ensure uniform application under these and similar circumstances.” The bill also clarified that nothing in the new language was meant to limit or abrogate the common law specific peril doctrine. S. 20, 209th Leg. (N.J. 2001), available at ftp://www.njleg.state.nj.us/20002001/S0500/20_11.PDF.

61. See W. VA. CODE § 44-9-1b (2007) (“a person last seen at any site within the area proclaimed by the governor [on November 5th, 1985] to be in a state of emergency as a result of the flooding in this state . . . and whose body has not been found or identified . . . shall . . . be presumed in law to be dead[.]”).

62. See 20 PA. CONS. STAT. ANN. §§ 5701, 5706 (West 2010); VA. CODE ANN. § 64.1-105 (2007); N.J. STAT. ANN. § 3B:27-1(b) (West 2012).

of section 5701(c) (relating to proof of death) which would justify a court to immediately determine that the presumed decedent died on September 11, 2001.”⁶³

Virginia took a different approach by passing a “9/11 exception” to its seven-year presumptive death statute.⁶⁴ The exception was specific to documented victims in the Pentagon disaster or on the plane flown into the Pentagon, whose bodies have not been found or identified.⁶⁵ Interestingly, Virginia was the only state responding to 9/11 to require a waiting period for the issuance of death certificates, although the waiting period was only three months.⁶⁶

Although New Jersey recognized specific peril in its common law doctrine, it amended its presumptive death statute by providing that “a resident or nonresident of New Jersey who is exposed to a specific event certified by the Governor as a catastrophic event that has resulted in a loss of life” was presumed dead.⁶⁷ The statute was passed less than a month after September 11, which the Governor declared a “catastrophic event,” and made retroactive to that date.⁶⁸ The statute itself also allowed for a judicial decree from the Superior Court of a presumptive death, if it concluded “from a review of the evidence, both direct and circumstantial, that the earlier death [. . .] has been established.”⁶⁹ The bill also allowed the Attorney General to initiate or intervene in any proceedings under the “catastrophic event” presumed death process.⁷⁰ This forward-looking provision anticipated a model many states would later emulate.

63. 20 PA. CONS. STAT. ANN. §§ 5701, 5706.

64. VA. CODE ANN. § 64.1-105.

65. *Id.*; see also H.B. 489/S.B. 575 2002, available at <http://lis.virginia.gov/cgi-bin/legp604.exe?021+sum+HB489S>.

66. VA. CODE ANN. § 64.1-105; see also H.B. 489/S.B. 575 2002, available at <http://lis.virginia.gov/cgi-bin/legp604.exe?021+sum+HB489S>. The waiting period may have been because of the delay, as that period would have passed almost as soon as the 9/11 exception passed.

67. N.J. STAT. ANN. § 3B:27-1(b) (West 2012).

68. S. 20, 209th Leg. (N.J. 2001), available at ftp://www.njleg.state.nj.us/20002001/S0500/20_11.pdf.

69. *Id.*

70. *Id.*

1. New York

Faced with the largest mass fatality in U.S. history and a tremendous recovery process, New York immediately recognized the difficult and lengthy recovery it was facing. Although recovery of the remains would take much longer, the attacks on the World Trade Center produced approximately half of New York City's annual fatalities in one day.⁷¹ The state used two mechanisms to issue presumptive death certificates. The first of these measures was already codified in a specific peril amendment known as EPTL 2-1.7.⁷² EPTL 2-1.7 allowed death to be established "in less than three years, if clear and convincing evidence indicates the most probable date of death."⁷³ Exposure to a specific peril was a sufficient basis for that determination.⁷⁴ A new amendment effective August 2000, EPTL 2-1.7(b) was itself an outgrowth of the TWA Flight 800 crash in 1996, which killed 230 people.⁷⁵ Search and rescue could not locate the crash site; based on the flight manifest, the county ME/C issued death certificates for those on-board the flight in spite of their unrecovered bodies.⁷⁶

However, EPTL 2-1.7 required certain administrative processes, such as running notice in newspapers ads, which officials knew were impracticable after 9/11.⁷⁷ Therefore, New York City officials employed a novel approach

71. The New York City Office of the Chief Medical Examiners (OCME) performs approximately 5,500 autopsies a year. Of the 2,749 people killed, only 288 intact bodies were recovered; the rest of the remains were recovered in nearly 20,000 individual pieces. The OCME worked 24 hours a day, 7 days a week, from September to December; 16 hours a day, 7 days a week from December to February; and 8 hours a day, 7 days a week, through May 2002. Gill, *supra* note 17, at 29. By October 2002, 1,432 victims had been identified; by September 2005, 58% of the 2,749 people missing had been identified. 1,152 remains could not be identified. *Id.*

72. N.Y. EST. POWERS & TRUSTS LAW § 2-1.7.

73. *Id.*

74. *Id.* at § 2-1.7(b).

75. Wallace L. Leinhardt, *Special Procedures for Victims of the World Trade Center Tragedy Provide Expedited Access to Assets*, 73 N.Y. ST. B.A. J. 8 (2001). TWA Flight 800 is the third-deadliest aviation crash in a U.S. territory.

76. *Id.*

77. For example, presumptive death certificates required posting notice for four weeks, as in a newspaper. N.Y. EST. POWERS & TRUSTS LAW § 2-1.7(b).

to help ease the administrative burden of issuing presumptive death certificates for missing persons. The Medical Examiner of New York City brought a summary action against the Commissioner of Health, requesting a declaratory judgment that would allow the ME's office to conclude a missing person had died in the attacks.⁷⁸ A victim's next of kin could submit an affidavit and supporting documents about the missing person.⁷⁹

The ME would employ a three-pronged evidentiary approach for determining, based on the next of kin's submission, whether the victim's disappearance was sufficient for filing a death report.⁸⁰ The three prongs were: 1) establishing the identities of the missing person and the person seeking a death certificate, as well as the requesting person's relationship to the missing person; 2) clearly connecting the missing person to the World Trade Center; and 3) confirming the missing person's continuing absence.⁸¹ This alleviated the need for adjudication of each absentee/missing person and allowed the city to "achieve two seemingly incompatible objectives—speedy relief and a prudent adjudicating mechanism."⁸² Petitioners who did not meet the three-pronged approach could appeal the decision.

By late October, less than two months after the attacks, 1,860 applications for expedited death certificates were received, and 1,641 had been resolved.⁸³ Eventually, 2,400 presumptive death certificates were issued by judicial decrees; about half of these were later changed to traditional death certificates when remains were identified.⁸⁴ The Office of the Chief Medical Examiner (OCME) noted that "the use of legal statutes allowed the prompt issuance of death certificates, which benefit surviving family members."⁸⁵ One OCME official noted "to have delayed issuing death certificates until all

78. *Hirsh v. Frieden*, 758 N.Y.S.2d 787 (N.Y. Sup. Ct. 2003).

79. *Id.*

80. *Id.* at 789; *see also* Gill, *supra* note 17, at 31.

81. *Hirsh*, 758 N.Y.S.2d at 758; *see also* Gill, *supra* note 17, at 31.

82. *Hirsh*, 758 N.Y.S.2d at 789.

83. Leinhardt, *supra* note 75.

84. Gill, *supra* note 17, at 31.

85. *Id.* at 32.

of the DNA testing had been completed would have resulted in more than 1,000 families waiting for more than 1 year to receive a death certificate.”⁸⁶

Although some officials were concerned that the procedure would cause confusion or be susceptible to abuse, these concerns went largely unfounded. The court itself cited “relatively few applications (approximately 50) [that] proved to be a sham or a mistake.”⁸⁷ There were, however, limits to New York City’s expedited process. The procedures did not cover out-of-wedlock relationships, divorced parents of minors who would become guardian of the minor, and next of kin whose loved one was not regularly employed but “might have been at the World Trade Center” at the time of attack.⁸⁸ Furthermore, executors who were not next of kin were not eligible for the expedited process.⁸⁹ However, those who were not eligible for the expedited death certificates could still use the procedures outlined in EPTL 2-1.7(b).

New York courts adjudicated only a handful of appeals for expedited death certificates. The cases comprised what one court referred to as cases that did not meet the evidentiary standards but “appear[ed] to have a ring of truth” to them.⁹⁰ Almost all of the cases centered on the sufficiency of proof connecting the missing person to the World Trade Center.⁹¹ While the number is relatively low, one case where a petitioner was denied a

86. *Id.* at 31. While death certificates can ease survivors’ concerns, presumptive death certificates create their own worries: “There was concern that family members might mistakenly believe that if an affidavit death certificate was issued, a diligent pursuit for the identification of the remains would stop.” *Id.* Communication and time proved the OCME’s dedication to identification. *Id.*

87. *Hirsh*, 758 N.Y.S.2d at 790.

88. *Leinhardt*, *supra* note 75, at 9.

89. *Id.*

90. *Hirsh*, 758 N.Y.S.2d at 790.

91. See *In re LaFuente*, 743 N.Y.S.2d 678, 683 (2002) (finding evidence that commuter who often attended conferences in the World Trade Center and had told coworker that he would be attending a conference that morning “clearly indicates absentee was in the immediate vicinity of the World Trade Center, and in all likelihood, in the North Tower when the first airliner struck”); *In re Philip*, 851 N.Y.S.2d 141, 142-43 (2008) (holding that circumstantial evidence, habit, and physician-wife’s predisposition to help others met evidentiary standard by showing her presence at the World Trade Center was “highly probable.”).

presumptive death certificate was overturned in 2008—seven years after it was originally filed.⁹² By comparison, the typical presumption-of-death waiting period would have been as long, and the wait was four years longer than in New York.⁹³

V. A POST-9/11 WORLD: OTHER STATES' STATUTORY RESPONSE TO MASS FATALITIES

9/11-related statutes were extraordinary, event-specific, and temporary. Although New York was proof that reactionary procedures could prove effective, after 9/11, states began to recognize that “there are circumstances in which an individual’s death is virtually certain. In such circumstances, the requirement that the administration of the individual’s estate be suspended [. . .] seems both unnecessarily harsh and unrealistic.”⁹⁴ As one commentator put it, “the reality is that, for some persons, the fact of the absence suggests the exposure to the specific peril.”⁹⁵ In those situations, five-year or seven-year waiting periods might pose hardships on surviving family.⁹⁶ A spate of states amended their presumptive death or specific peril statutes; most were directly attributed to the issues arising from 9/11 and “the registration of death certificates for individuals for which no body is found.”⁹⁷ These post-9/11 amendments represent an important step in the

92. *In re Philip*, 851 N.Y.S.2d at 142-43.

93. *See generally id.* at 141. *See also In re Application of Gartner*, No. 330585 (Sur. Ct. Nassau Cnty. Sept. 28, 2004) (declining a petition to find absentee exposed to specific peril of 9/11, but declaring absentee dead as of September 11, 2004, where distinction would particularly affect petitioner’s ability to receive 9/11-specific relief funds and benefits.).

94. Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration*, 55 MERCER L. REV. 459, 479 (2003).

95. N.Y. EST. POWERS & TRUSTS LAW § 2-1.7 (Supplementary Practice Commentaries).

96. *See, e.g., Presumptive Death Law, Catastrophic Events or Disasters and University of Kansas Hospital Authority Amendment: Hearing on H.B. 2733 and H.B. 2734 Before the H. Comm. on Health & Human Services*, 2002 leg., available at http://kslegislature.org/li/m/historical/committees/minutes/01_02/house/HsHHS2-6-02.pdf.

97. *Id.*

evolution of mass fatality and presumptive death certificates.⁹⁸ Amendments followed two typical models: either adding specific peril clauses to existing presumptive death statutes, or creating new statutes that not only addressed specific perils, but exclusively dealt with mass fatalities.

A. Simple Math: Georgia, Florida, and the Addition of Specific Peril

The simplest amendments added specific peril clauses to existing presumptive death statutes. Georgia is an example of one of these states. At the time, it required a statutory waiting period of four years. Alternatively, a twelve month period is available if death of the absentee is proven by a preponderance of the evidence.⁹⁹ After 9/11, the state recognized that in times when “an individual’s death is virtually certain,” the delay of administering an estate seemed “both unnecessarily harsh and unrealistic.”¹⁰⁰ Georgia amended its statute to allow an individual’s death to be proven at any time. To do so, a petitioner needed to show by clear and convincing evidence that the absentee was “exposed to a specific peril or tragedy resulting in probable death.”¹⁰¹ Florida took a similar approach and amended its presumptive death statute to allow “evidence showing that the absent person was exposed to a specific peril of death” as “a sufficient basis for the determining at any time after such exposure that he or she died less than 5 years after the date on which his or her absence commenced.”¹⁰² In 2003, Virginia amended its “9/11 exception” to a more generic “specific peril of death” clause.¹⁰³

Four years after 9/11, Louisiana, which had not changed its statute after 9/11, was struck by Hurricane Katrina and found itself facing a mass fatality incident with an additional complication—a city whose vital and criminal records were destroyed. The state recognized the need to expedite presumptive death certificates but was aware that opportunists might use

98. Another avenue of emergency relief for mass fatalities lies with the governor of a state. *See infra*, note 114.

99. *See* GA CODE ANN. § 53-9-1(a)-(b) (2011).

100. Radford, *supra* note 94, at 479.

101. GA CODE ANN. § 53-9-1(d) (2012).

102. 2003 Fla. Sess. Law Serv. 924 (2012).

103. VA. CODE ANN. § 64.1-105 (2007); *see also* J. Rodney Johnson, *Wills, Trusts, and Estates*, 38 U. RICH. L. REV. 287, 299 (2003).

simplified procedures and destroyed records to commit fraud or avoid debt or prison sentences.¹⁰⁴ The amended provision reflects this concern and states that a person whose “absence commenced between August 26, 2005, and September 30, 2005, and was related to or caused by Hurricane Katrina or Rita” and who was “not currently charged with an offense that is defined as a felony under the laws of the state of Louisiana or the United States of America shall be presumed dead after the passage of two years.”¹⁰⁵ The statute and the unusual waiting period of two years also acts as a tacit recognition of the chaotic nature of the city’s evacuation and response, which left Louisiana citizens displaced in states as far away as Maryland and New York.

B. Tying to Catastrophic Disasters

These relatively simple amendments reflected the sea change in the relationship between disaster and mass fatalities brought about by 9/11. In reality, however, changes such as those implemented by Georgia or Florida only aligned those states with New York’s EPTL 2-7.1, or, like New Jersey, codified common law principles. The more typical state response after 9/11 was to amend its statutes to contemplate a catastrophic event or disaster. These statutes not only recognized the potential for mass fatalities resulting in unrecovered remains, but also sought to establish procedures that recognized the incident’s larger context, often tying presumption of death to catastrophic events and providing alternate approaches for the issuance of the certificates.

In 2002, Kansas updated its laws by amending its presumption of death statute¹⁰⁶ to include absentees “missing as a result of a catastrophic event or disaster,” pursuant to its newly-passed §59-2708, which mimicked New York’s expedited death certificate procedures:¹⁰⁷

104. This is a common concern with presumptive death certificates, given the legal importance of death and its effect on the distribution of a decedent’s estate.

105. LA. CIV. CODE ANN. art. 54 (2011).

106. See KAN. STAT. ANN. §§ 59-2704, -2708 (West 2005).

107. The legislature was clear that the bill’s development was in response to 9/11, which caused “most state registrars of vital statistics to review their state laws in light of the exigencies that emerged in New York.” Supplemental Notes, H.B. 2733 (2002), available at <http://www.kansas.gov/government/legislative/supplemental/2002/SN2733.pdf>.

(2) An absentee shall be presumed dead immediately after the catastrophic event if:

(A) The absentee's body could not be recovered due to the nature of the catastrophic event; and

(B) evidence presented to a court of proper jurisdiction places the absentee at the site of the catastrophic event on the date and at the time of the event.¹⁰⁸

In 2003, Texas passed a statute for issuing a certificate of death by "catastrophe,"¹⁰⁹ defined as "the occurrence of a substantial force that causes widespread or severe damage, injury, or loss of life or property and from which it is not reasonable to assume that a person could survive."¹¹⁰ A list of examples includes natural disasters, explosions, and airplane crashes.¹¹¹ The statute describes the process for the issuance of a presumptive death certificate, requiring an affidavit and a brief waiting period of 10 days.¹¹² One forward-looking component of the statute, like New Jersey's, is that it allows an affiant for the certificate to be the next of kin or an "agent of a government authority that conducts a search" for the missing person and has concluded that search.¹¹³

Other states took a different approach, intrinsically tying the ability to issue a presumptive death certificate in a catastrophic disaster to a Governor's proclamation. In a state of declared emergency, most governors have the power to suspend laws and regulations as needed to manage a disaster, which could include those laws and regulations relating to deaths, death certificates, and presumed death certificates.¹¹⁴

For example, in 2002, Kentucky, which has a 7-year statutory period for presumption of death, adopted a separate statute regarding presumptive

108. KAN. STAT. ANN. § 59-2708 (West 2012).

109. TEX. HEALTH & SAFETY CODE ANN. § 193.010 (West 2012).

110. *Id.* § 193.010(a).

111. *See id.* § 193.010(a)(1)-(3).

112. *See id.* § 193.010(b).

113. *Id.* § 193.010(b)(2).

114. *See, e.g.* TEX. GOV'T CODE ANN. § 418.011-418.024 (West 2012); N.Y. EXEC. LAW § 29-a (McKinney 2012); 20 ILL. COMP. STAT. ANN. § 3305/7 (2012); FLA. STAT. ANN. § 252.36 (West 2012); LA. REV. STAT. ANN. § 29:724 (2012).

deaths following a catastrophic event.¹¹⁵ “Following a catastrophic event,” presumptive death certificates can be issued when a Governor-certified catastrophic event has occurred, led to loss of life, and diligent search and inquiry fails to find the missing person.¹¹⁶ The statute allows an applicant to receive a death certificate (that may indicate it was issued via court order).¹¹⁷ It also allows for the Attorney General to “initiate or intervene in any proceedings or action brought” pursuant to the declaration of death in a catastrophic event.¹¹⁸

Oregon adopted a similar statute, expanding a catastrophe to include “a natural disaster or an act of war, terrorism or sabotage” that “has caused the death of unknown persons on a specific date at a specific place.”¹¹⁹ For any civil or administrative proceeding, a missing person is presumed dead if it is shown that the missing person was “at or near the place described in a proclamation,” on the specified date, and that the absence “cannot be satisfactorily explained after diligent search.”¹²⁰ In addition, “the court may enter an order directing the State Medical Examiner to deposit a death certificate with the county registrar for a decedent presumed to be dead under this section” for administering the absentee’s estate.¹²¹ The statute is not meant to limit or abrogate the state’s common law special peril doctrine,¹²² which would presumably still be available for persons missing-presumed-dead, or death arising from non-catastrophic events.

C. California: The Comprehensive Disaster Model

The aforementioned statutes codify procedures similar to those used in New York following 9/11. The statutory evolution of presumptive death and specific peril statutes helped ease the emotional and legal burdens of mass

115. KY. REV. STAT. ANN. §§ 422.130, 422.132 (West 2012).

116. *Id.* § 422.132(1), (3).

117. *Id.* § 422.132(3).

118. *Id.* § 422.132(4).

119. OR. REV. STAT. ANN. § 176.740(1) (West 2012).

120. *Id.* § 176.740(2)(a)-(b).

121. *Id.* § 176.740(3).

122. *Id.* § 176.740(4).

fatality incidents and help ensure benefits reach survivors in a more efficient manner. Such statutes' efficacy relies in large part on administrative efficiency, which cannot always be assumed in a mass disaster. Allowing alternative methods to initiate the application for presumptive death certificates (such as the Governor, Attorney General, or agent of a government agency) addresses some of these administrative concerns. Few statutes, however, address the administrative burden on the person ultimately responsible for the death certificates—the ME/C. California, which has a five-year presumption of death period,¹²³ has comprehensively addressed mass fatalities statutorily. The result alleviates not only the emotional and legal burdens on family members and officials, but also creates a streamlined process for ME/Cs as well.

While California has a typical presumption of death statute,¹²⁴ it has developed a specific, parallel process for mass fatalities. The processes are similar to those used by certain municipalities. For instance, the Ventura County Board of Supervisors in California voted to petition the Superior Court to issue a declaration that victims of the Alaska Airlines crash were deceased,¹²⁵ and the Rhode Island Attorney General issued a similar petition to a court after the 1999 EgyptAir crash, requesting presumptive death certificates be issued to waiting relatives.¹²⁶

California's Health and Safety Code is one of the few that specifically contemplates mass fatalities. It defines mass fatality incidents as those where "there are more dead bodies than can be handled using local resources," numerous persons are known to have died, but bodies are irrecoverable, or recovery and identification is "impracticable or impossible."¹²⁷ The county ME/C is authorized to "make the determination" that such a mass fatality condition exists.¹²⁸ Additionally, California Health

123. CAL. PROB. CODE § 12401 (West 2012).

124. *Id.* ("In proceedings under this part, a person who has not been seen or heard from for a continuous period of five years by those who are likely to have seen or heard from that person, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. The person's death is presumed to have occurred at the end of the period unless there is sufficient evidence to establish that death occurred earlier.").

125. Nelson, *supra* note 11.

126. *Id.*

127. CAL. HEALTH & SAFETY CODE, § 103451(a)(1)-(3) (West 2006).

128. *Id.* § 103451(b).

and Safety Code §103450 allows an ME/C to submit a petition for death certificates for a list of victims rather than having to file individual petitions:

In the event of a mass fatalities incident, a single verified petition with respect to all persons who died may be filed by a coroner or medical examiner with the clerk of the superior court in and for the county in which the mass fatalities incident occurred for an order to judicially establish the fact of, and the time and place of, each person's death . . .¹²⁹

Furthermore, the ME/C is authorized to determine when these measures are necessary. Sections (b) and (c), which address these administrative issues, were added in 2002¹³⁰ via a bill acknowledging both 9/11 and California's recent airplane crash: "both the events of September 11th and the Alaskan Airlines crash highlight the challenges grieving families face in obtaining a death certificate following a tragic loss of a loved one whose body cannot be recovered."¹³¹

VI. CONCLUSION

The statutory evolution of the 2000s shows the varied ways to respond to a mass fatality and presumptive death certificates. While New York and other states, such as Louisiana, acted quickly after mass disasters to implement temporary fixes that worked well, such fixes require an adaptive and *operating* legislature and government—something that cannot always be assumed during mass disaster planning. Thus, putting such measures "on the books" will help ease legal uncertainty and ensure that measures are properly executed with minimal delay. States that have yet to amend their presumption of death statutes to include specific perils such as mass disasters or catastrophic deaths should do so with all deliberate speed and include measures in those statutes that address administrative concerns.

Additionally, the U.S. should continue its forward-looking approach to help address international mass fatalities abroad. The international community began a discussion in earnest after the 2004 Indian Ocean tsunami, because tens of thousands of European nationals were vacationing

129. *Id.* § 103450(c).

130. *Hearing on A.B. 1872 Before the Assemb. Comm. on Health*, 2002 Reg. Sess. (Cal. 2002).

131. *Id.*

in the area where the tsunami struck.¹³² In 2007, the Council of Europe¹³³ concluded:

[D]ue to unprecedented mobility caused by the development of travel and prolongation of stays in foreign countries, as well as the increased risk and occurrence of terrorist attacks and manmade or natural disasters, due among other things to climate change, there is a need to supplement and, where legislation already exists, to further harmonise [sic] the legislation in member states on the presumption of death of missing persons.¹³⁴

The Council of Europe then laid out its *2007 Recommendations on Principles Concerning Missing Persons and the Presumption of Death*, which provided procedures for managing the resolution of issues associated with missing persons and the issuance of death certificates.¹³⁵ The recommendations were incorporated in the Athens Convention¹³⁶ and were

132. Risk Management Solutions, *Estimating Losses from the 2004 Southeast Asia Earthquake and Tsunami*, RMS SPECIAL REPORT 6 (2005); see also Rebecca Ellen, *The Victorian Response to the Tsunami Disaster in Thailand 2004/2005: A Personal Account*, 3 VICTORIAN INST. FORENSIC MED. 15, 17-18 (2005) (finding that nearly eight months after the tsunami struck, 1,500 bodies remained at one mortuary site and that disaster victim identification was more difficult than usual because the tsunami had removed the clothing, jewelry, and other key personal effects that are often used to help identify the deceased); see also Yoko Nishikawa, *Quake-Ravaged Japan Digs Mass Graves*, REUTERS (Mar. 23, 2011), <http://www.reuters.com/article/2011/03/23/us-japan-graves-idUSTRE72M1JE20110323> (stating that five years after the tsunami, unclaimed bodies remained in chillers, and 370 unidentified bodies were buried in a nearby plot, while the U.S. and other countries secured a Thai government guarantee that remains of foreign victims would not be buried without identification).

133. The Council of Europe is composed of forty-seven countries. See Eur. Consult. Ass'n, *Recommendations on Principles Concerning Missing Persons and the Presumption of Death* 4 (2009), <http://www.coe.int/aboutcoe/index.asp?page=47pays1europe&l=en>.

134. *Id.* at 2.

135. *Id.*

136. Convention Relating to the Establishment of Death in Certain Cases, Sept. 14, 1966, ICCS No. 10, <http://www.ciecl.org/Conventions/Conv10Angl.pdf>. The Convention had a number of signatory-states, and contained provisions about a declaration of death where a person is missing but death is certain. It was used successfully by state signatories successfully for 9/11 cases where bodies were never found, but those signatory's citizens were known to be at the World Trade Center at the

officially released and adopted in 2009 to provide additional guidance for missing persons where death is *not* certain.¹³⁷

The *Principles* are relatively recent, and their efficacy in application to international events remains untested. Furthermore, they do little to address individual countries that are facing a mass fatality composed primarily of their own citizens, such as the 2011 earthquake and tsunami Japan experienced. Nine months after those disasters, the *Wall Street Journal* ran an article highlighting the difficulty survivors faced as they attempted to carry on family businesses, receive benefits, or resolve housing situations where family members were missing but not confirmed dead.¹³⁸ In June 2012, in order to “accommodate families of the missing,” Japan’s Justice Ministry took “unusual steps” to simplify how missing persons would be handled. Although Japan has a seven-year waiting period for presumed death, or, in specific cases, one year,¹³⁹ “the Japanese government cut the wait to three months from the time a person is declared missing for tsunami victims.”¹⁴⁰

time of the attacks. However, the Convention had two main shortfalls that the 2004 Indian Ocean tsunami highlighted: the Convention dealt primarily with maritime and flight situations, and only addressed *certain* death. In situations such as the Indian Ocean tsunami, application of the Athens Convention proved more difficult because in many cases, death was not certain.

137. The *Principles* follow a time-differentiated model, employing a three-tiered approach: immediate declaration where death is certain; a one-year wait period where death is probable; and a five-year wait period where death is uncertain. The certificate of presumed death may be issued by a competent authority in one of three places: where the missing person was a national, domiciled, or a habitual resident; where the missing person was reported missing in the territory of that state; or where the vessel or aircraft was registered, if the person went missing on a voyage. Either a person with a legitimate interest or an authority designated by the state may make the request for declaration of death. Convention Relating to the Establishment of Death in Certain Cases, *supra* note 136; see also Eur. Consult. Ass’n, *supra* note 133.

138. Daisuke Wakabayashi, *Japanese in Legal Limbo Over Missing*, WALL ST. J., Oct. 11, 2011, at A13. In the three hardest-hit prefectures, more people were missing-presumed-dead, than were confirmed dead. See also Chiyomi Sumida, *Massive Search by U.S., Japanese Troops Wraps Up with 339 Bodies*, Stars and Stripes, Apr. 4, 2011, <http://www.stripes.com/news/pacific/earthquake-disaster-in-japan/massive-search-by-u-s-japanese-troops-wraps-up-with-339-bodies-found-1.139985>.

139. Wakabayashi, *supra* note 138, at A13.

140. *Id.*

Mass fatalities, whether manmade or natural, present a wrong for which there can be no remedy. While it is true that “no matter the authority or power”¹⁴¹ of a court, it cannot bring back lost loved ones; therefore, the use of presumptive death and specific peril statutes will help ease the difficulties survivors face.

141. *World Trade Ctr. Families for Proper Burial, Inc. v. City of New York*, 567 F. Supp. 2d 529, 542-543 (2d Cir. N.Y. 2009).